In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1256

ROBERT DULAINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This malpractice action against the United States under the Federal Tort Claims Act was filed in the district court in November, 1964. The Act provides that "a tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues." 28 U.S.C. 2401(b).[1]

[1] 28 U.S.C. 2401(b), at the time this action was brought, provided:

"(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500, it is presented in writing to the appropriate Federal agency within two years after such claim

262-185—67

The district court found as a fact that the claim accrued no later than May 19, 1960 (Pet. App. 5, 6) and accordingly dismissed the action as barred by the two year limitation period. The court of appeals, also finding that the claim accrued "at least as early as 1960," affirmed the dismissal (Pet. App. 10). There is no occasion for further review of this determination, in which both lower courts concurred. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

Petitioner also urges that the two-year statute of limitations was tolled by his "administrative claim filed on March 6, 1957 with the Los Angeles Veterans Administration Regional Office" (Pet. 21). This contention was neither raised nor considered below and hence is not available to petitioner here. In all events, the argument is unsound. The tolling provision of 28 U.S.C. 2401(b) is activated only when an administrative claim for Federal Tort Claims Act benefits is filed. Here, however, the claim was filed under an entirely different Act, *i.e.*, 38 U.S.C. 351, for monthly compensation benefit payments from the Veterans Administration. Moreover, the explicit language of 28 U.S.C. 2401(b) limits "tolling" to those cases involving administrative claims "not exceeding $2,500".

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accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

In the present case, petitioner's claim is for $100,000 in damages.[2]

The petition for certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

[2] Nor can petitioner derive any comfort from the 1966 amendment of the statute of limitations, requiring that all tort claims be first presented to the appropriate government agency. That amendment is applicable only to claims "accruing six months or more after the date of its enactment", which was July 18, 1966. Public Law 89–506, 89th Cong., 80 Stat. 306–308. And both courts below, as already noted, found that this claim accrued in 1960.

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